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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-347

No. COA 21-447

Filed 17 May 2022

N.C. Industrial Commission, I.C. No. 18-041204

MATTHEW DONLEY, Employee, Plaintiff,

v.

CHIP GANASSI RACING, Employer, GREAT NORTHERN INSURANCE COMPANY (CHUBB), Carrier, Defendants.

Appeal by Plaintiff from opinion and award entered 18 May 2021 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 8 February 2022.

Campbell & Associates, by Bradley H. Smith, for Plaintiff-Appellant.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Ryan W. Keevan, for Defendants-Appellees.

INMAN, Judge.

¶ 1 This appeal involves a worker whose physical job requirements doubled at the same time the work force in his chosen field was cut in half. Adding injury to insult, he got hurt on the job before being terminated and has been unable to earn the same wages since.

¶ 2 Matthew Donley ("Plaintiff") appeals from the opinion and award of the North Carolina Industrial Commission ("the Commission") denying the reinstatement of disability compensation. Because the Commission's finding that Plaintiff failed to show that his incapacity to earn was caused by his workplace injury is supported by competent evidence, we affirm the decision of the Commission.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 3 Plaintiff worked for Chip Ganassi Racing ("Employer") as a tire carrier on Employer's NASCAR pit crew starting in 2017, earning a yearly salary of $135,000 plus bonuses. As a tire carrier, Plaintiff was required to carry a 65-pound tire during pit stops and was occasionally required to carry two tires at once. As part of his employment, Plaintiff was also required to participate in team workouts and strength training, which included lifting more than 70 pounds at a time.

¶ 4 At the end of the 2017 NASCAR season, Employer learned that a new rule would halve the number of tire carriers per team in 2018, which would thereafter require each tire carrier to carry 130 pounds in tires during every pit stop. Because the team would be able to retain only four of its eight tire carriers, Employer's pit crew coach assessed the tire carriers' performance under the more physically demanding requirements of their revised role during practices and training from November 2017 through February 2018. At the start of the 2018 season, Plaintiff's job title was changed to "backup tire carrier." Plaintiff did not travel to or participate

in any NASCAR races during the 2018 season, and Employer's pit crew coach did not consider him as one of the team's top four carriers under the new format.

¶ 5 On 31 January 2018, Plaintiff injured his back during a team workout. He was evaluated by a physician on 7 February 2018 and received pain medication and a Toradol injection. Plaintiff continued to practice with the team as a backup tire carrier until he and the other backup tire carriers were terminated on 10 April 2018. At the time of his termination, Plaintiff did not have any work restrictions relating to his back injury.

¶ 6 Following his termination, Plaintiff tried without success to gain employment with other NASCAR teams. He attended real estate school, obtained his real estate license in July 2018, and became a licensed real estate broker in 2019. He did not look for any other non-racing jobs.

¶ 7 In August 2018, Plaintiff was referred to a spine specialist, who recommended treatment including a steroid injection and limited Plaintiff to lifting no more than ten pounds. Plaintiff filed for and began receiving temporary total disability benefits in September 2018. His doctor continued to write him out of work through December 2018.

¶ 8 In March 2019, Plaintiff underwent lumbar surgery. He reached maximum medical improvement in July 2019, and his doctor assessed him with a 10 percent permanent partial impairment and recommended a 70-pound lifting restriction. This

restriction precludes Plaintiff from working as a NASCAR tire carrier, as the position now requires the carrying of two 65-pound tires at a time.

¶ 9 When Plaintiff began working as a real estate broker in August 2019 Employer subsequently ceased paying disability benefits. On 3 October 2019, Plaintiff filed an application for reinstatement of compensation with the Commission. Plaintiff's case was heard by a Special Deputy Commissioner, who determined that Plaintiff had failed to show his loss in earnings was related to his admittedly compensable work injury. Plaintiff also sought an award of disability compensation, which was likewise denied. The Full Commission entered its opinion and award on 18 May 2021, denying his claim for disability compensation and affirming the denial of Plaintiff's application to reinstate disability payments. Plaintiff appeals.

II. ANALYSIS

A. Standard of Review

¶ 10 On appeal, we review a decision of the Industrial Commission to determine whether the Commission's findings of fact support its conclusions of law. *Aldridge v. Novant Health, Inc.,* 2021-NCCOA-651, ¶ 13. Findings of fact that are supported by competent evidence are binding on appeal. *Id.* Unchallenged findings of fact are presumed to be supported by competent evidence and are likewise binding. *Chaisson v. Simpson*, 195 N.C. App. 463, 470, 673 S.E.2d 149, 156 (2009). We review conclusions of law, including whether compensable disability exists based on the facts

found, *de novo. McRae v. Toastmaster, Inc.,* 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004); *Parker v. Wal-Mart Stores, Inc.,* 156 N.C. App. 209, 212, 576 S.E.2d 112, 113 (2003).

B. Plaintiff's Disability Determination

¶ 11 Plaintiff argues that the Commission erred in finding Plaintiff had not provided credible evidence that he is incapable of earning the same wages as a result of his injury and concluding that Plaintiff is not entitled to disability compensation under N.C. Gen. Stat. § 97-30 (2021). We disagree.

¶ 12 To prove compensable disability an injured employee must present evidence showing three essential elements: (1) he is incapable after his injury of earning the same wages he had earned before the injury in the same employment; (2) he is incapable of earning the same wages he had earned before his injury in any other employment; and (3) the incapacity to earn was caused by the workplace injury. *Hilliard v. Apex Cabinet Co.,* 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). An employee can meet this burden by a variety of methods:

> (1) the production of medical evidence that he is physically or mentally, as a consequence of the work-related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment;

> or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (citations omitted). Plaintiff introduced evidence that his earnings as a real estate broker were less than what he earned as a NASCAR tire carrier. However, the Commission found that Plaintiff failed to prove that his reduced earning capacity was caused by his workplace injury.

¶ 13 The Commission found that Plaintiff "has not provided credible evidence that he is incapable of earning the same wages he had earned prior to the injury in the same or in any other employment as a result of the work-related injury." Plaintiff argues that this finding is not supported by competent evidence and conflicts with the Commission's other, unchallenged findings of fact. We disagree. The evidence and the Commission's other findings of facts are consistent with this finding and support the Commission's conclusion that Plaintiff's injury was not the cause of his reduced earnings.

¶ 14 The Commission found that NASCAR imposed a new rule that forced Employer to cut its team of tire carriers in half, terminating four employees and doubling the physical demand of the remaining employees' jobs. Employer evaluated its carriers in November 2017, December 2017, January 2018, and leading up to the February Daytona race. Plaintiff was not placed under a work restriction during the team's

evaluation of the carriers and was in the bottom half of the team before his injury occurred. The Commission noted that "tire carriers are getting bigger," and that one of Employer's current tire carriers is a former NFL linebacker. Plaintiff was not selected to work any NASCAR races in 2018, though he did work as a pit crew member in lower-tier races. Employer continued to employ Plaintiff for two months following his injury, during which Plaintiff participated in practices and workouts, and terminated him and three other tire carriers when the new rule was imposed. Plaintiff was not under a work restriction at the time of his termination. Once the new rule went into effect, the total number of available tire carrier positions within NASCAR was reduced, and the job that Plaintiff was terminated from effectively no longer existed as the new definition of tire carrier required that two tires be carried at a time.

¶ 15 Ultimately, the Commission's unchallenged findings of fact show that Plaintiff was not a competitive candidate for the tire carrier position in light of the new rule promulgated by NASCAR, even before his injury and work restrictions, and support its conclusion that "Plaintiff failed to show that his reduced earnings were *because of* the work-related injury." (Emphasis in original).

¶ 16 Plaintiff argues that the fact that he got a new job as a real estate agent, earning less than he did as a tire carrier, shifts the burden to Employer to show that he could have obtained a job paying the same as his prior earnings. *See Britt v. Gator*

Wood, 185 N.C. App. 677, 684, 648 S.E.2d 917, 922 (2007) (holding that evidence of post-injury employment at lower wages, "while not dispositive of disability, shifts the burden to the employer to establish that the employee could have obtained higher earnings"). But getting another job does not shift the burden to Employer regarding the third *Hilliard* prong, causation: Plaintiff still bears the burden of showing "but for the work-related injury . . . [the plaintiff] would not have . . . suffered wage loss." *Medlin v. Weaver Cooke Constr., LLC*, 229 N.C. App. 393, 396, 748 S.E.2d 343, 346 (2013) (quoting *Fletcher v. Dana Corp.*, 119 N.C. App. 491, 497, 459 S.E.2d 31, 35 (1995)).

¶ 17 We acknowledge that Plaintiff's termination prior to being assigned work restrictions does not necessarily preclude a finding that his reduced earnings were caused by his work-related injury. In *Britt*, the plaintiff was injured at work after being notified that he would be laid off at the end of that month. 185 N.C. App. at 679, 648 S.E.2d at 919. Although his injury may not have caused his termination and *immediate* wage loss, we held that this did not preclude a finding of disability "if, because of Plaintiff's injury, he was incapable of obtaining a job in the competitive labor market." *Id.* at 683, 648 S.E.2d at 921. Unlike in *Britt*, however, the Commission found in this case that Plaintiff's reduced wages were not caused by his injury, but by his pre-injury relatively inferior ability as a tire carrier, the reduction in available positions, and the increased requirements of those positions. As this finding was

supported by competent evidence, we are bound by it. *Chaisson*, 195 N.C. App. at 470, 673 S.E.2d at 156.

III. CONCLUSION

¶ 18 Because Plaintiff bears the burden of proving the three elements of disability, including causation, and the Commission's findings support its conclusion that Plaintiff failed to carry that burden, we affirm the opinion and award of the Full Commission denying Plaintiff partial disability benefits.

AFFIRMED.

Chief Judge STROUD and Judge ARROWOOD concur.

Report per Rule 30(e).